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No. 82-830

IN THE

Supreme Court of the United States

October Term, 1982

MOSHE MENORA on behalf of SHOLEM MENORA, a minor; GILDA ALLSWANG on behalf of RONALD ALLSWANG, a minor; RABBI ABRAHAM BRUCKENSTEIN on behalf of RONALD BRUCKENSTEIN, a minor; BERTON WEINER on behalf of MICHAEL WEINER, a minor; DR. BERNARD SERED on behalf of MITCHELL SERED, a minor; HEBREW THEOLOGICAL COLLEGE, INC.; and IDA CROWN ACADEMY OF ASSOCIATED TALMUD TORAHS, INC.; individually and on behalf of all others similarly situated,

Petitioners,

v.

ILLINOIS HIGH SCHOOL ASSOCIATION, an unincorporated association and LAVERE L. ASTROTH, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the remand of this case to the district court for a hearing as to a safe method of affixing yarmulkes on the heads of Orthodox Jewish students during inter-scholastic basketball competition deprives petitioners of religious liberty in violation of the Free Exercise Clause of the First Amendment to the United States Constitution, given the fact that their religious requirement is only that they wear head covering and that the manner of attachment thereof is not specified by petitioners' religion.

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OPINIONS BELOW

The opinion of the District Court (App. e. of Petition) is reported at 527 F.Supp. 637 (N.D. Ill. 1981). The opinion of the Court of Appeals for the Seventh Circuit and the dissenting opinion (App. a. of Petition) are reported at 683 F.2d 1030 (7th Cir. 1982).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The pertinent provisions of the United States Constitution, Amendment I, and the National Federation of State High School Associations' Basketball Rule 3.5 are set forth in the Petition at pages vi and vii.

STATEMENT OF THE CASE

This case arose as the result of a response by the Illinois High School Association (hereafter "IHSA") to an inquiry

from the petitioner schools about a high school basketball rule (hereafter "Rule 3.5") promulgated by the National Federation of State High School Associations, Basketball Rules Committee. The rule, as it existed at the time of trial and at the present states:

> 3.5 The referee shall not permit any player to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard and unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Headbands no wider than 2 inches made of nonabrasive, unadorned single color cloth, fiber, soft leather, or rubber are legal. Rubber (elastic) bands may be used to control hair.

> Any equipment, which is unnatural and designed to increase a player's height or reach or to gain an advantage, shall not be used.[1]

This rule prohibited the wearing of a skull cap or "yarmulke" attached by bobby pins or clips while a student athlete was playing interscholastic basketball.

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[1]The rules committee previously decided upon a rules change which deleted soft barrettes which, because of girls' competition, had been permitted in the previous wording of the rule. The trial court erroneously, and without any evidence on the subject stated that the yarmulke is the "functional equivalent" of a soft barrette and took the position that the rule change was motivated because of the pendency of this case. This position is not supported in the record.

The minor plaintiffs who were or are students at two Orthodox Jewish high schools and their parents and respective schools sought federal injunctive relief to prevent the application of Rule 3.5 to them or the class they represented (stipulated to be all present and future students at each respective secondary school). Petitioners' claim was that application of Rule 3.5 to them violated their first amendment right to freely exercise their religion.[2]

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[2]At the trial court petitioners also claimed that the rule violated the equal protection clause of the fourteenth amendment. The district court did not address this issue; the court of appeals held that no such violation occurred. Petitioners have abandoned their fourteenth amendment claim in this Court.

A temporary restraining order was entered by the trial court on February 23, 1981. The trial of the action on the merits was consolidated, by agreement of the parties, with the hearing of the preliminary injunction application pursuant to Fed. R. Civ. P. 65(a)(2).

The IHSA is a voluntary association of private and public schools in the State of Illinois. Each member school participates in governing the IHSA through its principal pursuant to by-laws and regulations adopted by a majority vote of the principals. The IHSA is a member of the National Federation of State High School Associations (hereafter "National Federation") which is a voluntary federation of the fifty state associations. The Petitioners voluntarily joined the IHSA and annually

agreed to comply with the by-laws, rules and regulations.

Rules pertaining to an individual sport are developed by the National Federation Rules Committee in concert with the United States Olympic Committee, The National Collegiate Athletic Association and others. The playing rule in question was initially developed and adopted by a joint committee of these organizations.

Petitioner schools have participated in basketball for several years without the student/athletes wearing yarmulkes in all contest games. In 1981, at an early season contest, a referee called to the attention of one school that the yarmulke then being worn violated Rule 3.5.

Requests for an interpretation of the rule were sought by petitioners in light of the fact that they were required by the tenets of their religion to cover their

heads at all times. The National Federation indicated that the basketball rules book already contained the history of the rule and interpretations. When petitioners did not receive an exemption to the rule for the wearing of the yarmulke with the sole method of attachment being bobby pins or clips, they filed this action.

At no time did the IHSA contest the sincerety or correctness of petitioners' belief concerning the requirement of the head covering. Neither the trial court nor the court of appeals inquired into the validity of this belief.

The testimony was undisputed that the purpose of Rule 3.5 is to promote safety. Plaintiffs' testimony did not challenge the rationale, purpose, scope or applicability of the subject playing rule.

Certain exceptions currently in Rule 3.5 are allowed 1) to control hair and 2)

to absorb perspiration, both of which protect the player since neither rubber bands nor sweat bands are known to have ever come off in thousands of games. All other objects are restricted including jewelry, religious medals and other head adornments.

The yarmulke becomes dislodged during basketball games as often as three times per game although some games are played without the yarmulke falling from the head. Petitioners' witnesses conceded that the presence of the yarmulke on the floor increases the possibility of injury. No evidence was presented by petitioners as to whether a method other than bobby pins or clips could be used to secure the yarmulke safely yet not violate the petitioners' religious tenets.

After a trial without a jury the court granted judgment for the plaintiffs and

permanently enjoined the defendants from enforcement of the rule against the plaintiff class.

The Seventh Circuit Court of Appeals reversed, vacated the trial courts's decision and remanded the case for the taking of additional evidence on the issue of whether a more secure head covering could be devised which would satisfy both the religious requirements of petitioners and the state's compelling interest in safety. The court of appeals denied plaintiffs' petition for rehearing with suggestion for rehearing en banc.

REASONS FOR DENYING THE WRIT

The issue in the present case is uniquely narrow, and no amount of puffery by petitioners can convert it into one warranting review by this Court on certiorari. The case does not in any sense broadly concern "novel and unprecedented theor-

ies involving the allocation, as well as the extent of, the parties' burdens in a case raising claims under the Free Exercise Clause". (Petition, p. 13). Nor does it involve an "unprecedented expansion of the scope of appellate review of factual determinations." (Petition, p. 14). The only question raised is whether petitioners met their threshold burden under a first amendment claim of establishing that the challenged state regulation in fact conflicted with their claimed religious practice. The Seventh Circuit Court of Appeals properly held that based on the record below, petitioners failed to make this showing.

I. THE ORDER OF REMAND BY THE SEVENTH CIRCUIT NEGATES ANY REASON FOR THE GRANT OF CERTIORARI

The Supreme Court repeatedly has affirmed the important policy of avoiding constitutional adjudication whenever it is

unnecessary to the resolution of a claim. Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), reh'g denied, 297 U.S. 728 (1936). It was in furtherance of this policy that the court of appeals remanded this case to the district court to create a record which would show that there exists a true conflict between the claimed religious practice of the petitioners in keeping their heads covered at all times, and the claimed interest of the state in the safe play of interscholastic basketball. The court found that based upon the record presented to the district court, the petitioners failed to meet this burden of proof, and that the goals of both parties might be satisfied without resort to constitutional adjudication.

At oral argument, counsel for peti-

tioners informed the court of appeals that the Orthodox Jewish belief specified only that the head be covered; it did not prescribe how the covering was to be affixed to the head. The court of appeals referred this case back to the district court for the taking of evidence with respect to whether there is a safer method of affixing the skullcap than the use of bobby pins, or whether a more secure head covering could be devised to be worn during interscholastic basketball play. If the parties could agree on a method which would satisfy the religious requirements of the petitioners and still assuage the safety concerns of the respondents, a constitutional question could be avoided.

The IHSA has let it be known to the petitioners, and reiterates here for the record, that if the petitioners propose a

secure form of head covering which will also comply with their religious requirements, the IHSA will interpret the National Federation rule to allow such a head covering to be worn during interscholastic basketball play in Illinois, regardless of how it may be interpreted elsewhere. To date, petitioners have refused to propose any such means of securely covering their heads.

It is abundantly clear that the concern with the safety and protection of yet uninjured young men prompted the court of appeals to ask the parties to make the inquiry as to alternate means of attachment of the yarmulke. We respectfully submit that the Court can take judicial notice of e.g. the widely publicized increase in quadraplegic and other serious injuries in football which has caused sporting equip-

ment manufacturers to withdraw from manufacturing football helmets. The grim aspects of life as a quadraplegic or paraplegic may also be judicially noticed. If even one of these tragedies or other less serious injuries can be eliminated by fastenings other than bobby pins or clips, for example attachment to head sweat bands or other similar means, then at least this should be explored as ordered by the court of appeals.

Respondents are puzzled as to the persistence by the petitioners of pursuing what appears to remain as an imagined rather than a real grievance with the IHSA and with the Seventh Circuit Court of Appeals. We here express the hope that the petitioners will recognize the benefits of cooperatively exploring, as the Seventh Circuit Court of Appeals suggested, the most

reasonable way in which the obligation to cover the head while engaging in inter-scholasitic basketball play may be exercised so as to accommodate the state's interest in preventing accidents. If yarmulkes are to be worn, the important consideration is the elimination of a potentially unsafe method of attachment, and a non-intransigent exploration of what methods of attachment are least likely to produce accidental injury.

Because petitioners can in all likelihood get the full relief that they seek by proposing to the IHSA a safe means of attaching the yarmulke, or proposing an alternate secure form of head covering, it is unnecessary that this Court decide any issue raised in this Petition.

If this litigation cannot be terminated by mutual agreement, the district

court retains jurisdiction to take additional evidence upon the question of the suitability of an alternate means of head covering. Presumably, after such a hearing, the court can order either the type of attachment to keep the yarmulke in place other than bobby pins, or it can specify a different secure form of head covering.

II. THE ISSUES PRESENTED IN THE PETITION ARE NOT RAISED IN EITHER THE DECISION OR RECORD BELOW

Although petitioners offer three questions for review, the issues posed can be divided into two themes. In question one petitioners assert that the court of appeals improperly allocated the burden of proof in a free exercise of religion claim. The second and third questions take exception to the manner in which the court of appeals analyzed the record presented in the district court. However, neither the

decision below nor the record raises the issues posed by the questions presented in the Petition.

In their petition for rehearing with suggestion for rehearing en banc filed with the Seventh Circuit, petitioners raised substantially the same questions as are raised in the petition for certiorari filed with this Court. Indeed, the Petition here raises no new issues. The petition for rehearing claimed that the court of appeals disregarded the record and overturned the district court's findings of fact without applying the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. It also claimed that the court unconstitutionally placed the burden of accommodation on the plaintiff religious observers. The petition for rehearing also made explicit the claim that petitioners imply here, that

the decison of the court of appeals was based upon an improper scrutiny of the sincerity of the petitioners' religious beliefs.

In its published opinion denying the petition for rehearing, the Seventh Circuit addressed each of the concerns raised herein. This opinion leaves no doubt that the court did not base its decision on the allegedly impermissible grounds which form the foundation of the Petition for Certiorari.

On the issue of changing the burden of proof the court of appeals stated as follows:

> Finally and most important, the petition argues that we placed the burden of "accommodating" competing sacred and secular interests on the religious claimants. We did not. We understand "accommodation" in this context to refer to a giv-

> ing up in whole or in part of some religious practice, or conversely the giving up in whole or in part of some secular obligation, in order to give effect to the competing interest. If we had held that the Association's concern with safety requires that the plaintiffs abandon either interscholastic basketball or adherence to the tenets of their faith, that would be requiring the plaintiffs to "accommodate" their religious claims to the interests asserted by the state. But we did no such thing. We placed on the plaintiffs only the burden of demonstrating that there is in fact a conflict between the state's interest in safety and their interest in complying with all the requirements of Jewish law.

683 F.2d 1030, 1036-37 (emphasis added).

The court also noted in its opinion that it did not apply the standards of Rule 52(a) only to those facts which the court considered to be "legislative," that is, a fact that goes to the reasonableness of a rule or other enactment, to which the clearly erroneous standard does not apply.

There is nothing to indicate that the dictates of Rule 52(a) were not applied to the subsidiary facts.

III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT AND ANY DECISION OF THIS COURT

In an attempt to elevate this case to a level worthy of consideration by this Court, petitioners claim that the decision of the court of appeals is in conflict with Wisconsin v. Yoder, 406 U.S. 205 (1972), Thomas v. Review Board of the Indiana Employment Security Div., 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 398 (1963). The issue where the conflict arises, according to the petitioners, is the allocation of the burden of proof in a first amendment claim. (Petition, pp. 14, 15).

As discussed above, in the opinion denying the petition for rehearing, the

court of appeals specifically disavowed any claim that it had altered the parties' burden of proof.

> If we had held that the Association's concern with safety requires the plaintiffs abandon either interscholastic basketball or adherence to the tenets of their faith, that would be requiring the plaintiffs to "accommodate" their religious claims to the interests asserted by the State. But we did no such thing. We placed on the plaintiffs only the burden of demonstrating that there is in fact a conflict between the State's interest in safety and their interest in complying with all the requirements of Jewish law . . . Only if it should turn out that the plaintiffs cannot devise a secure head covering that will satisfy simultaneously the requirements of Jewish law and the state's legitimate concern with safety in basketball play would the question of who has the burden of accommodation arise.

683 F.2d at 1037 (emphasis added).

Petitioners characterize the relevant holdings of Wisconsin v. Yoder, Thomas v.

Review Board, and Sherbert v. Verner, as imposing on a plaintiff the singular burden "of demonstrating a conflict between a religiously motivated practice and a some governmental requirement." (Petition, p. 14). A simple reading of the opinion of the court of appeals here shows that this singular burden is all that was required of these petitioners. The Seventh Circuit required only that petitioners demonstrate a conflict between a religiously motivated practice and a governmental regulation. It was the failure of the petitioners to make the initial showing of a conflict which caused the court of appeals to vacate and remand the decision to the district court. Thus, there is no conflict of decisions involved in this case.

In an attempt to raise this case to the magnitude required for the grant of a writ

of certiorari, petitioners distort the holding of the Seventh Circuit and contend that it will result in courts passing upon the correctness of plaintiffs' practice of their religious beliefs. (Petition, pp. 20-21). Such an inquiry admittedly is forbidden by Thomas v. Review Board. Here, however, the correctness of petitioners' belief that they must cover their heads at all times was never challenged by respondents. The Seventh Circuit decision denying the petition for rehearing disposed of the unfounded claim that they questioned the correctness of this belief.

> The petition for rehearing complains that in our opinion we "scrutinzed the sincere religious beliefs of the plaintiffs." We did not. We expressed doubt whether the stipulation entered into by the parties provided an intelligible account of those beliefs, but on the crucial issue of belief --whether Jewish law requires Jewish males to play basketball wearing only

> insecurely mounted yarmulkes -- we relied on the statement of the plaintiffs' counsel at oral argument, that Jewish law does not specify the method of head covering and would not be violated by a secure method.

683 F.2d at 1036 (emphasis added).

Had the court of appeals not been assured by counsel for the petitioners that the means of attaching the yarmulke was not specified by the Orthodox Jewish faith, the court would not have questioned the mode of attachment. Because there was no inquiry into the correctness of the petitioners' religious beliefs, there was no violation of Thomas.

IV. NO NEW QUESTION OF FEDERAL CONSTITUTIONAL LAW IS INVOLVED IN THIS CASE, NOR HAVE PETITIONERS BEEN DENIED ANY CONSTITUTIONAL RIGHT

This case involves simply the constitutionality of a high school basketball rule which prohibits during interscholas-

tic play the wearing of head decorations or head gear. In its current posture, the issue presented to this Court is whether or not the court of appeals properly found that the plaintiffs failed to meet their burden of proving that their first amendment rights were infringed by the application of this rule to them.

On the one hand, petitioners acknowledge that participation in interscholastic athletics is not "of any great moment except to the adolescents involved." (Petition, p. 28). Yet on the other hand petitioners assert that failure of this Court to address the claimed errors of the court of appeals "threaten[s] to deny" not only petitioners, but all religious minorities, the protections of the free exercise clause. (Petition, p. 28). This transparent inconsistency demonstrates the

inadequacy of the Petition. The decision of the court of appeals simply cannot be read as petitioners claim.

No amount of strained semantics can disguise the fact that there is no new question of federal constitutional law involved in this case. This Court has made it clear that the conclusion that there is a conflict between a religious practice and a state regulation is only the beginning and not the end of the inquiry in a first amendment free exercise claim. United States v. Lee, U.S., 102 S.Ct. 1051, 1055 (1982). Whether or not a challenged statute or regulation will be held to violate the free exercise clause depends on the degree of the burden imposed on the religious practice. Wisconsin v. Yoder. The Seventh Circuit Court of Appeals in this case correctly found that

the petitioners failed to establish a conflict, the threshold requirement of proving a claim for violation of the free exercise clause.

The cases which are controlling in this action are those which raise free exercise of religion challenges to actions by bodies regulating voluntary athletic activities. In each of these cases the first amendment claim was rejected because the burden on the free exercise of religion in the athletic area, particularly interscholastic athletics, is de minimus under the uniformly applied tests of Wisconsin v. Yoder, and United States v. Lee. See, e.g., Walsh v. Louisiana High School Athletic Association, 616 F.2d 152 (5th Cir. 1980) reh'g denied 621 F.2d 440, cert. denied, 441 U.S. 1124 (1981); Windsor Park Baptist Church, Inc. v. Arkansas Activ-

ities Association, 658 F.2d 618 (8th Cir. 1981); Valencia v. Blue Hen Conference, 476 F.Supp.809 (D.Del. 1979), aff'd mem., 615 F.2d 1355 (3rd Cir. 1980); Cooper v. Oregon School Activities Association, 52 Ore.App. 425, 629 P.2d 386 (1981); Harris v. New York State Athletic Commission, 56 App.Div.2d 835, 392 N.Y.S. 2d 70 (2nd Department 1977). Petitioners offered no authority contrary to this line of cases which in situtations comparable to that presented here has found that whatever burden may be imposed upon the free exercise of religion by the interscholastic athletic association rule is other than de minimus.

V. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO THE EVIDENCE PRESENTED TO THE DISTRICT COURT

By selecting and discussing a distinction mentioned by the court of appeals as

to "historical" versus "legislative" facts, the petitioners would have this Court ignore the record as a whole. That record clearly demonstrates that the requirements of Rule 52(a) were met in the instant case.

Rule 52(a) is inapplicable to the mixed questions of law and fact presented in the record and to the ultimate conclusion of the case, that the plaintiffs failed to demonstrate that their religious practice was infringed by the operation of the National Federation rule. See, Pullman-Standard v. Swint, U.S. , 102 S.Ct. 1781, 1790 n.19; K & M Joint Venture v. Smith International, Inc., 669 F.2d 1106 (6th Cir. 1982); S.E.C. v. Bausch & Lomb, Inc., 565 F.2d 8 (2d Cir. 1977).

Respondents contended in the court of appeals that the district court applied an

incorrect legal standard in measuring the constitutionality of Rule 3.5. Specifically, the district court held the IHSA to a heavier burden of justifying any restriction that it may place on the free exercise of religion than a formal agency of the State of Illinois would have. The court of appeals found the district court's reasoning on this issue to be "unsound." 683 F.2d at 1036. Where, as here, an improper legal standard is applied by the district court, the "clearly erroneous" requirement of Rule 52(a) no longer circumscribes appellate review. Kentucky Fried Chicken v. Diversified Packaging, 549 F.2d 368 (5th Cir. 1977).

While it is unnecessary to reach the clearly erroneous question, to the extent that Rule 52(a) is applicable to this case, a brief review of the record demonstrates

that the clearly erroneous standard was satisfied.

At trial the IHSA presented unrefuted expert testimony that the purpose of the rule in question was safety. Plaintiffs' testimony did not challenge the rationale, purpose, scope or applicability of Rule 3.5.

As Dr. Edward Steitz, often referred to as the present day father of basketball testified, he is "without doubt" that the wearing of a yarmulke, with which he is familiar and has had occasion to wear in the manner commonly affixed, would present a potential danger if allowed to be worn during basketball play. As a player, coach, olympic committee representative and basketball rules interpreter, he drafted the original Rule 2.2 and supports the present Rule 3.5.

Petitioners' testimony was that yar-

mulkes fall off during basketball play as often as three times a game. Petitioners' witnesses uniformly conceded that the presence of a yarmulke on the floor, like any other extraneous object, increases the probability of slipping and falling.

The IHSA presented unrefuted expert testimony at trial that a yarmulke having fallen to the court surface causes a 60-65 percent reduction or loss of traction between a basketball shoe and a wood playing surface irrespective of the type of yarmulke being worn. The consequence is unexpected or "surprise" falls with a "surprise" fall likely resulting in a greater number of more serious injuries. Frequent and sharp turns which occur during competition, in a limited area where one's attention is on the ball and not playing surface, substantially increase the risk of harm.

The petitioners did not present any expert's testimony in the sports field, particularly basketball, or in the field of physics. Yet the trial court apparently ignored testimony of Mr. Saggau and Dr. Steitz, two noted basketball and sports experts, and Dr. Willis, an engineer who studied friction coefficients and other physical phenomenon relevant to basketball.

Plaintiffs' testimony did not consist of the named plaintiffs nor any medical expert, yet the trial court assumed emotional harm to the plaintiffs. This finding of emotional injury could only have been based on the testimony of a single witness, Rabbi Blanchard, who became principal of one of the schools only six months prior to the filing of this action. Rabbi Blanchard described what he believed would be the

views of his students if they could no longer play interscholastic basketball under the auspices of the IHSA. He acknowledged that he conducted no study of his students in concluding what would be their views and attitudes.

By ignoring the factual testimony, and applying a novel legal standard, the trial court ruled for the petitioners, and held that the IHSA's concerns were vague and speculative and did not constitute a compelling interest.

The court of appeals did no more than accept the facts as presented by the parties and apply the correct legal standard to those facts, when it reversed the district court decision. Since no evidence was available as to whether an alternative method of attachment would or would not violate Orthodox Jewish beliefs,

the court of appeals remanded the case with direction to ascertain whether an alternative means of attaching the yarmulke is available which would not present a safety hazard.

When the record is viewed as a whole, it is apparent that the dictates of Rule 52 (a) were met. Petitioners' attempt to transform the court of appeals' characterization of the facts into a basis for the grant of a writ of certiorari should be rejected.

CONCLUSION

United States Supreme Court Rule 17 provides that review on a writ of certiorari is not a matter of right and will be granted only when there are special and important reasons therefore. Respondents respectfully contend that no special or important questions are raised in the

Petition here. The Seventh Circuit Court of Appeals applied the proper rules of law to the facts presented to the district court in finding that petitioners failed to meet their burden of proving a violation of the free exercise clause of the first amendment.

For the reasons stated above this case presents no question justifying further judicial review. Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

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